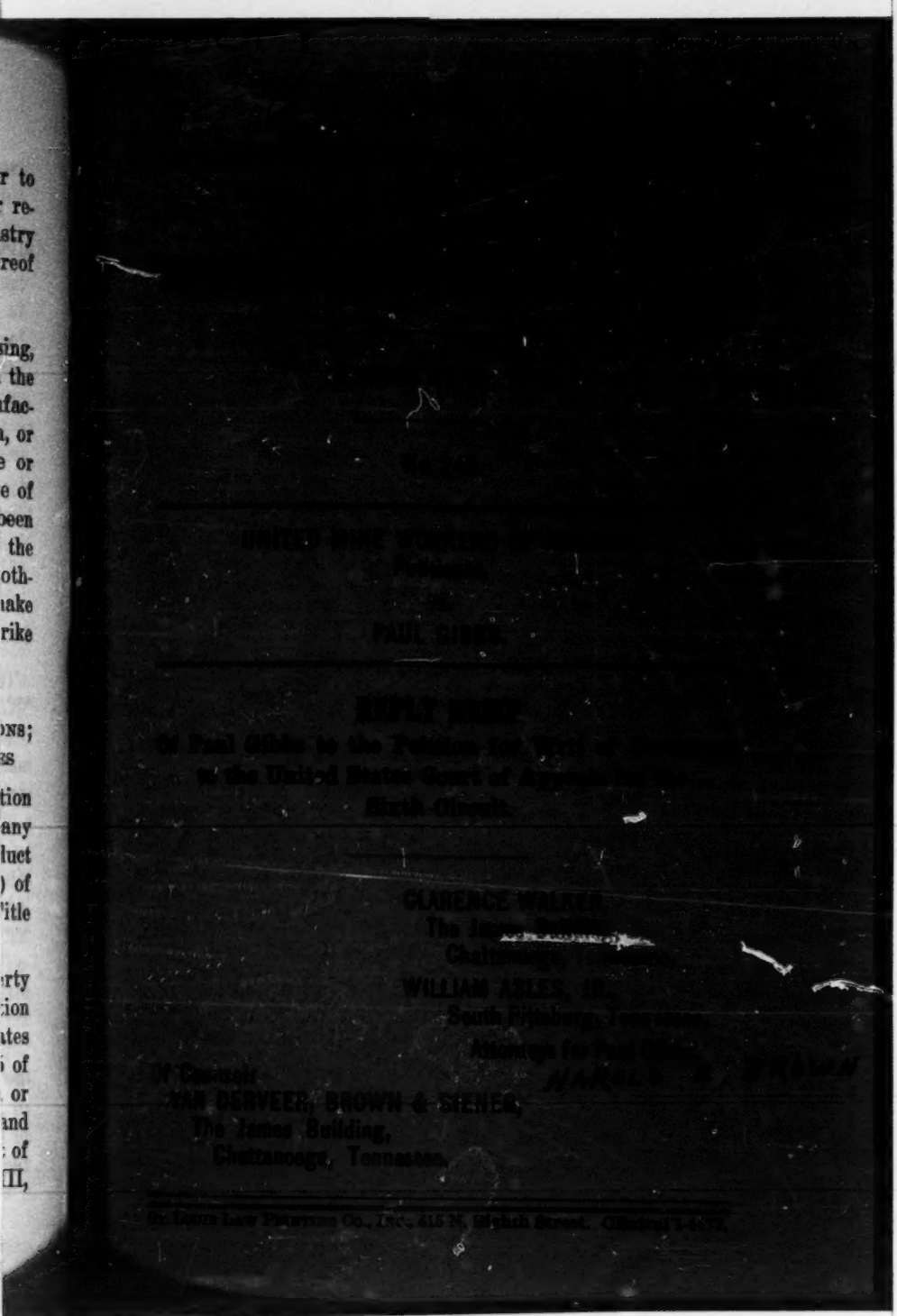

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 243.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

PAUL GIBBS.

REPLY BRIEF

Of Paul Gibbs to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Respondent accepts the statements of the Petitioner (herein referred to as UMW) as to the procedural history of the case.

COUNTER STATEMENT OF FACTS.

Respondent cannot accept the statement of facts contained in petitioner's brief as respondent believes that in the case at bar the concerted activities on the part of the UMW was to intimidate and create wide spread fear and tension throughout the entire area. This was accomplished by acts of violence, threats of violence and coercion over the whole area. To show some of these activities the acts of violence and threats of violence should be shown. Our counter statement of facts is contained in Appendix I to this brief.

ARGUMENT.

QUESTION 1.

"Where a parent union assumes the direction of picketing theretofore commenced by a local union and insists upon and achieves order, is the parent union liable under state law for violence committed prior to the parent union's involvement?"

The Sixth Circuit's decision properly implements the doctrine of the federal preemption and, as such, is in full harmony with the decisions of this Court, including **Youngdahl v. Rainfair, Inc., 355 U. S. 131 (1957); San Diego Building Trades Council v. Garmon, 369 U. S. 236 (1959),** and **Local 20, Teamsters Union v. Morton, 377 U. S. 252 (1964).** The finding that the UMW was liable was wholly consistent on the basis of violence or "threatened violence" under the Rainfair and Morton decisions.

This question on labor conduct was answered by the Sixth Circuit fully and totally consistent with the National Labor policy. This decision does not thwart a union's legitimate efforts to curve excessive conduct on the part of those it is the union's duty to represent.

In the instant case UMW was not faced with the choice of abandoning its members or restoring order. The Sixth Circuit did not find that the UMW had a choice but on the contrary found that the UMW took advantage of and proceeded to continue the initial advantage from the violence with around the clock picketing.

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> "The aura of violence remains to enhance the effectiveness of picketing. Certainly there is a threat of violence when the man who has just knocked me down from my steps continues to stand guard at my front door."

There are no analogous circumstances between this case and **NLRB v. Mayer** as that matter dealt only with individual securing a change of union representation. It in no way was based on the employer having initiated or assisted in the violence change of the representative.

The imposition of liability on the apparent Union in these circumstances and under facts in this case does not require the Union to forego its right to picket in an orderly way because of the prior violence. The factual situation combined with the initial violence showed very clearly, and was found by the jury and the Court of the Sixth Circuit not only violence but "threats of violence", making said decision wholly and totally consistent with the preemption question of the **Garmon** and **Morton** cases. The acts and conduct and over-all picture are fully consistent with past cases.

The Sixth Circuit's imposition of liability does not hold grave questions of preemption and union responsibility which this Court has not had occasion to consider, but on the contrary is wholly and totally consistent with the past decisions of this Court.

We submit these questions have already been settled by this Court.

QUESTION 2.

"Where an appeal to prejudice in jury argument on matters unrelated to the evidence was found to have materially affected the verdict, was it proper, in light of the indiscriminate and extensive nature of the appeal to prejudice, to cure the verdict by remittitur rather than a new trial, on the theory that the appeal to prejudice was 'calculated to influence the size of a favorable verdict for the plaintiff without affecting the determination on the merits?' "

The petitioner's characterization of the improper argument of respondent's counsel is not as prejudicial or vicious as petitioner asserts. The District Court fully realized that a case such as this case involves one of the most sensitive areas of the law on one in which many people have strong feelings. This is most specifically shown by the District Court's last cautionary instruction before the jury began its deliberation (515a-516a). Whether misconduct in a trial of a cause of action is of such a nature that a fair and impartial verdict cannot be reached rests primarily in the judicial discretion of the lower Court. In view of the cautionary instructions given by the District Court at the time of the petitioner's objections, counsel's prompt abandonment of the improper (argument) (487a) and the cautionary instruction that the case should be decided by the jury dispassionately, with complete impartiality and without any feeling of prejudice, sympathy, bias or favor, and to decide the case strictly on the basis of the evidence as it had been given the jury and on the law as the District Court had instructed, removed any improper effect the argument might have produced. **Maryland Casualty Co. v. Kelly, 4th Cir., 45 F. 2d 788, 1930.**

The District Court, in ruling on petitioner's motion for a new trial, was of the opinion that the remarks of counsel were not prejudicial to the rights of petitioner. The Court felt counsel's argument improper but when viewed on the record as a whole, was not prejudicial. Although remarks of counsel may be improper, of questionable propriety or reprehensible, such remarks under all circumstances, must be prejudicial to the rights of the other party to require reversal or granting a new trial.

Argument that $25,000.00 meant nothing to defendant. **Sheffield Steel Corp. v. Vance, 236 F. 2d 938, C. C. A. 8th, 1956.** If jury found for plaintiff,

they would in effect accuse master and mate of being criminally negligent. **Morron v. Atlantic Refining Co., 176 F. 2d 313 (C. C. A. 3, 1949).** Plaintiff's counsel's reference to a truck as "Monster" or "Battle Ship". **Associated Petroleum Carriers v. Beall, 217 F. 2d 607 (C. C. A. 5, 1955).** Reference to plaintiff—"How Small", "How Cheap". **Berman v. Anderson, 232 F. 2d 56 (C. A. D. C. 1956).** "The casualties in war are provided for by a grateful Government. I leave it to you to say as an illustration of industry and its gratitude for one whose duty—" **Fleming v. Husted, 164 F. 2d 65 (C. C. A. 8th, 1947),** cert. denied **333 U. S. 843, 68 S. Ct. 661, 92 L. Ed. 1127.** Argument picturing defendant as friend of poor against defendant who was pictured as exploiter of the defenseless. **Show Warehouse Co. v. Southern Railway Co., 294 F. 2d 850 (C. C. A. 5th, 1961),** cert. denied **369 U. S. 850, 82 S. Ct. 933, 8 L. Ed. 2d 9.** Characterization of defendant as a monster. **Smith v. McNulty, 293 F. 2d 924 (C. C. A. 5th, 1961).**

The District Court and Sixth Circuit viewed the argument of counsel in a different perspective than petitioner. The District Court was of the opinion that the jury's verdict was excessive in view of the evidence in the record relating to damages and not as a result of mistake, caprice, sympathy, prejudice or other improper motive on the part of the jury (in determining liability). The question of excessiveness of verdict is primarily for the trial Court and will not be disturbed on appeal unless the verdict is so grossly excessive that the denial by trial Court of a motion for a new trial constitutes an abuse of discretion. **Trowbridge v. Abrasive Company of Philadelphia, 190 F. 2d 825 (C. C. A. 3, 1951).** The District Court in the exercise of its duty and power when of the opinion the amount of the verdict was against the weight of the evidence, con-

ditioned the denial of a new trial by suggesting a remittitur. By this proper exercise of duty and power, the error of excessiveness in the verdict was cured. **International Paper Co. v. Busby, 182 F. 2d 790 (C. C. A. 5, 1959); White Oak Coal Co. v. UMW, 318 F. 2d 591 (C. C. A. 6, 1963).**

It is respectfully submitted that the size of the verdict for compensatory and punitive damage is not indicative of bias, prejudice and passion, on the part of the jury resulting from counsel's argument. The District Court cured the excessiveness of verdict by proper performance of duty and exercise of its power when the District Court was of the opinion the amount of the verdict was against the weight of the evidence, to condition the denial of a new trial by suggesting a remittitur.

QUESTION 3.

"In an action for damages against a labor union in which plaintiff alleged that acts which occurred during labor disputes constituted a violation of Section 303 of the Act and a violation of state law, would the District Court have pendent jurisdiction of a non-federal claim?"

This is a suit to recover damages from the petitioner for injury and damage sustained by the respondent as a result of petitioner's alleged unlawful violation of the Secondary Boycott Provision of the Labor Management Relations Act (29 U. S. C. A. 187) and the unlawful interference, by means of an unlawful conspiracy, with respondent's right to engage in a lawful employment and business under the laws of the State of Tennessee. The complaint alleges two grounds of recovery, one Federal ground and one State ground, but only a single cause of action (10a-11a).

The doctrine of pendent jurisdiction is a well settled principle of law, being first announced in **Siler v. L. & N.**

Railroad Co., 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909), and reaffirmed and explained in **Hurn v. Oursler, 289 U. S. 238, 47 S. Ct. 586, 77 L. Ed. 1148 (1933)**, clearly establishing that where two distinct grounds in support of a single cause of action are alleged, and the Federal ground is not plainly wanting in substance, the Federal Court, even though the Federal ground be not established, nevertheless has jurisdiction to dispose of the case on non-federal grounds.

In **Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 47 S. Ct. 600, 77 L. Ed. 1062 (1933)**, this Honorable Court very positively stated that the question of jurisdiction of a court is not based upon the facts developed in the case, but upon the allegations of the complaint.

> "If the bill or complaint sets forth a substantial claim, a case is presented within the Federal jurisdiction. However, the Court upon consideration, may decide as to the legal sufficiency of the facts alleged to support the same."

and also,

> "The question of jurisdiction, as thus limited, is to be determined by the allegations of the bill, and not by the facts as they may turn out, or by decisions of the merits. **Mosher v. Phoenix, 287 U. S. 29, 53 S. Ct. 67, 77 L. Ed. 148**, and cases cited."

In **Bell v. Hood, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946)**, this Honorable Court said:

> "Jurisdiction therefore is not defeated * * * by the possibility that the averment might fail to state a cause of action on which the petitioner could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of

> jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and * * * must be decided after * * * the Court has assumed jurisdiction over the controversy."

The District Court either had or did not have jurisdiction to hear and consider this cause, which case must be decided as of the time when the action was filed. **Mullen v. Torrence, 9 (Wheat.) 537, ... L. Ed. 154 (1924); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938).** If jurisdiction exists it is not a contingent or a partial one. Having taken jurisdiction in the case, jurisdiction continued in the Court to enable it to dispose of all issues raised by the pleadings. **Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829 (1876).**

Not only did the complaint as amended allege a violation of the Secondary Boycott Provisions of the Labor Management Relations Act, but it also alleged a clear violation of Tennessee Common Law. Both grounds of recovery present only one cause of action. The identical facts or substantially identical facts will support both the local and federal grounds of recovery.

The fundamental difference between "cause of action" and "grounds of recovery" has been explained by this Honorable Court on many occasions. **Hurn v. Oursler,** *supra*; **Levering & Garrigues Co., et al. v. Morrin et al.,** *supra*; **Baltimore Steamship Company v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069 (1927); American Fire & Casualty Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951).** The respondent is not permitted to split his cause of action and file an action in Federal Court for violation of Federal law and also file an action in a State Court for violation of State law, alleging the same facts and violation of the same right as a ground for

recovery in both suits. **Baltimore Steamship Co. v. Phillips**, *supra*; **Globe & Rutgers Fire Insurance Co. v. Cleveland, 162 Tenn. 83 (1930); Saddler v. Apple, 28 Tenn. 342 (1848); Mobile & Ohio Railroad Co. v. Mathews, 115 Tenn. 172 (1905).**

The District Court and the Sixth Circuit did not err in their ruling that the serious acts of violence, threats of violence and mass picketing were not protected activities under the Federal law. The cases cited by petitioner are cases where there was peaceful picketing and no violence, or if violence, as in **United Steel Workers of America v. N. L. R. B., 376 U. S. 483, 84 S. Ct. 899, ... L. Ed. 2d ... (1964)**, it was not of such a serious nature as the violence and tortious conduct as found in the case at bar, and **International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958); United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656, 74 S. Ct. 833, 93 L. Ed. 1025 (1954).** In **San Diego Building Trades Council v. Garman, 359 U. S. 236, 247, 79 S. Ct. 773, 781, 3 L. Ed. 2d 775 (1959)**, state jurisdiction to award compensatory and punitive damages for violent union activities, was reaffirmed, although not applicable to the decision of that case.

> "It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, or conduct marked by violence and imminent threats to the public order. International Union, United Automobile, Aircraft and Agricultural Implement Workers, etc. v. Russell, 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; United Construction Workers, etc. v. Laburnum Const. Corp., 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025."
>
> "State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic

peace is not overridden in the absence of clearly expressed congressional direction. * * *'' (359 U. S. 247, 79 S. Ct. 781.)

United Steel Workers of America v. N. L. R. B., *supra*, is not in conflict with the Sixth Circuit. Violent (mass) picketing, (even) if "primary", and not violative of Section 8 (b) (4), does not legalize it under other laws, state or federal. The extension of extreme violent activities and threats of violence to a front remote from the immediate dispute, having as an objective of such violence and mass picketing the interference with business intercourse not connected with ordinary operations, does not escape the secondary boycott ban.

The exact theory as applied in the case at bar has been applied and followed in the following cases: **UMW v. Meadow Creek, 6th Cir., 263 F. 2d 52,** cert. denied, **359 U. S. 1013, 79 S. Ct. 1149, 3 L. Ed. 2d 1038 (1959); Flame Coal Co. v. UMW, 6th Cir., 303 F. 2d 39,** cert. denied; **Osborne Mining Co. v. UMW, 6th Cir., 279 F. 2d 716,** cert. denied, **364 U. S. 881; Gilchrist v. UMW, 6th Cir., 290 F. 2d 36,** cert. denied, **368 U. S. 875; Price v. UMW, 6th Cir., 336 F. 2d 771,** cert. denied, ... **U. S.** ..., **85 S. Ct. 899,** ... **L. Ed. 2d (1965).**

It is submitted the case at bar is a proper case for the application of the doctrine of pendent jurisdiction. The respondent had only one cause of action for the violation of a single right but had two grounds of recovery, one Federal and one State. The Federal ground was not plainly wanting in substance, and the District Court had jurisdiction to hear and determine the case on both Federal and State grounds.

The Federal law has not pre-empted the states from granting compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence, threats of violence, mass picketing and im-

minent threats to the public order. In the event an illegal secondary boycott be not established under the facts as proven at the trial, the District Court had jurisdiction to determine all issues of the case, including those under State law.

QUESTION 4.

"Where a verdict of damages is based upon a finding of liability under Section 303 of the Act and state common law and where damages recoverable under the two theories are not necessarily the same and it is impossible to ascertain to what extent the jury relied on one theory or the other in assessing the award of damages, and where it is found that the action was erroneously submitted to the jury on the Section 303 claim, may the verdict be upheld on the sole basis of the common law claim?"

The District Court was fully aware of the many difficulties of trying a case as this, and the danger of error which would result in having to try the case a second time. The District Court in an effort to avoid error decided to submit special interrogatories to the jury to answer the fact issues upon which the jury verdict would depend. On November 13, 1962, at a conference in chambers the District Judge discussed the special request to charge and the matter of the form of verdict (67a). Subsequently, and before the argument to the jury, counsel for both parties were given the proposed special interrogatories for review and suggestions. The petitioner did not object to the interrogatories as not correctly presenting the issues the jury was called upon to answer or on any ground before the case was submitted to the jury, the petitioner did not poll the jury when the verdict was read in open court and did not move at that time or before the jury was dismissed that any alleged inconsistency in the answers be resubmitted to the jury for clarification. The

respondent believes that the petitioner waived any alleged error and definitely did not preserve its right to allege this as error by its failure to act at the appropriate time. **Safeway Stores v. Dial, 311 F. 2d 595, 5th C. C. A., 1963; Penn v. Glenn, 265 F. 2d 911, 6th C. C. A., 1959.**

Rule 49 (b) of the Federal Rules of Civil Procedure makes specific provisions for the course to be followed where there is inconsistency between the general verdict and the answer to interrogatories. If there be any inconsistency between the verdict and the jury's answer to interrogatories it is the duty of the Courts to harmonize the answers, if possible under a fair reading of the Court's instructions and the special verdicts. **Gallick v. B. & O. Railroad Co., 372 U. S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963).** A review of the Court's charge and the answer to interrogatories would definitely find the answers consistent with the verdict (31a-34a, 509a-513a).

The principles controlling the present question are not in conflict.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." **Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355, 364, 82 S. Ct. 780, 786, 7 L. Ed. 2d 798.** We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, as in **Arnold v. Panhandle & S. F. R. Co., 353 U. S. 360, 77 S. Ct. 840, 1 L. Ed. 2d 889; McVey v. Phillips Petroleum Co., 288 F. 2d 53 (C. A. 5th Cir.); Morris v. Pennsylvania R. Co., 187 F. 2d 837 (C. A. 2d Cir.) (collecting authorities),** before we are free to disregard the jury's special verdict and remand the case for new trial."

Respondent submits that there is not any inconsistency between the jury's verdict and its answer to interroga-

tories. If the petitioner questions that the interrogatories did not correctly present an issue or issues to the jury, or relates to an issue which could have been clarified by the jury before it was dismissed, the petitioner, by not objecting at the time, failing to submit interrogatories to the court to be presented to the jury and failure to move to have the answers clarified resulted in a waiver by petitioner. A review of the District Court's instructions and the jury's answer to the interrogatories does not show any real inconsistency as claimed by petitioner.

CONCLUSION.

The respondent respectfully submits that the Court of Appeals properly affirmed the District Court's action and no significant question is presented by the petition. Accordingly, the respondent prays that the petition for writ of certiorari be denied and make final the judgment of the court below.

Respectfully submitted,

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APPENDIX I.

COUNTER STATEMENT OF FACTS.

Respondent, Paul Gibbs, for more than thirty-two (32) years prior to August 15, 1960, since he was fifteen years of age, had been engaged in the coal, or coal mining, or coal hauling business (89a).

On August 12, 1960, Paul Gibbs was employed by Grundy Mining Company as mine superintendent at the starting salary of Six Hundred ($600.00) Dollars per month and in the capacity of an independent operator was granted a coal hauling contract to haul the coal produced at Gray's Creek Mine at a price of seventy-eight (78¢) cents per ton (93a).

On Saturday, August 13, 1960, Waldon Schrum received information of the proposed opening of the Gray's Creek Mine by Paul Gibbs in Grundy Mining Company (457a). Waldon Schrum was the president of Local 5881, and he immediately tried to contact George Gilbert, District 19 representative, to tell him the information and advise him of a called meeting of Local 5881 for Sunday, August 14, 1960 (465a, 457a).

On August 15, 1960, several members of Local 5881 went to the entrance of the Gray's Creek work site where they met the men employed by Grundy and persuaded them not to attempt to commence work. The persuasion being aided by a display of fire arms among the members of Local 5881 (99a-101a and 151a).

On August 16, 1960, a substantial number of men employed by Grundy reported to the mine site where they were met by a crowd, numbering from forty (40) to one hundred fifty (150) men, a large number of whom were carrying various types of fire arms, who again persuaded the men not to attempt to commence work. The per-

suasion, at this time, was brought home to the employees when one of their vehicles was fired upon and hit by one of the members of the mob. Paul Gibbs' truck was stopped as he drove along the Pocket Road when it reached the intersection of Gray's Creek by eight (8) to ten (10) men who ran along in front of the truck with guns raised to their shoulders and pointed at Mr. Gibbs. One of the members of the group opened the truck door, grasped Mr. Gibbs' arm and attempted to pull him from the truck while the remaining men maintained their weapons to their shoulders. Mr. Gibbs was detained for approximately two (2) hours during which time he was apprehensive as to who was going to hit or shoot him first. Later, he was escorted by a motorcade to the intersection of Coal Valley Road and Highway No. 108, a distance of approximately two (2) miles from the Gray's Creek entrance where he witnessed the beating of Johnny Cain and the burning of his brief case and other papers. Gibbs and Cain were escorted from this area through Palmer, Tennessee, up to the intersection of Highway No. 108 and Highway No. 185 before the mob agreed to release Mr. Gibbs (103a-110a and 151a-154a).

On August 17 or 18, 1960, a mob or a crowd of one hundred (100) to one hundred twenty-five (125) men gathered near the office of Tennessee Consolidated Coal Company, parent of Grundy Mining Company, at Palmer, Tennessee. Two (2) officers of the Company were harassed by the crowd, some of whom were carrying weapons. One of the Company officers was manhandled and cursed, and one of the crowd pointed a 30-30 carbine rifle at the officer as he was getting in his car. Attempts were made to block their car so they could not leave, and finally when they were about to leave, two (2) cars pulled in side by side in front of their car so they were not allowed to pass (232a, 247a-248a).

On August 22, 1960, a visitor to the area asked a group of men picketing near Highway No. 108 for George Gilbert, after recognizing Gilbert's car at the scene. George Gilbert came out of the woods and told the visitor he could not go down the Pocket Road, but suggested another route to the visitor's destination along which he would observe some of Gilbert's men, whom he was told to tell that it was alright to pass (159a-162a).

After these events, Paul Gibbs was forced to turn over the operation of his mine to one of his employees, and within a week or ten (10) days after the violence of August 15 and 16, a sack was burned at the mouth of the mine, which could suffocate workers in the mine if they stayed there long enough; and an exhaust fan belt which was cut several times (452a-454a).

Gray's Creek area is one of the best coal areas in the Sewanee coal scene, and it was contemplated that Grundy Mining Company would eventually open around ten (10) mines in the Gray's Creek area (201a, 215a). That after the violence and activities of August 15 and 16, and thereafter, Tennessee Consolidated Coal Company or Grundy Mining Company would not hire Paul Gibbs, because, had Paul Gibbs been hired, none of the mines would have been open today (206a). Tennessee Consolidated Coal Company would not execute leases of prime coal bearing lands to Mr. Gibbs, because it would have been a waste of time as he would never have had the opportunity by himself to mine coal (214a-215a).

It was shown at the trial that George Gilbert told Paul Gibbs, "I want you to keep your damn hands off of that Gray's Creek area, and tell that Southern labor union that we don't intend for you to work that mine" (128a). George Gilbert also made statements to others in regard to Paul Gibbs that "Hell, we can't let that go

on" and that "Paul was trying to bring in the other union" and that he (Gilbert) said, "He ain't going to get by with it" (219a). "Paul was trying to bring in the Southern labor union into the coal field" and he (Gilbert) said, "The union won't let him do it." "They have ways of preventing him from doing it," "and he seemed to think Gibbs was going to have to go," "and he said he had friends in high places that could move him out of the mine business" (257a-258a).

After this threshold success, picketing was maintained for a period of nine (9) months, seven (7) days a week, twenty-four (24) hours a day, at the entrance to the mine area (383a, 332a-333a).